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ORIGINAL

No. 96-629

Supreme Court, U.S.
FILED
NOV 21 1996
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARTHUR CALDERON, Petitioner

v.

STEVEN H. CASWELL, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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ERIC S. MULTHAUP
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(415) 821-6000

Attorney for Respondent

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No. 96-629 [redacted]

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARTHUR CALDERON, Petitioner

v.

STEVEN H. CASWELL, Respondent

Pursuant to Rule 15.3, Supreme Court Rules, respondent Steven Caswell hereby applies for permission to proceed in forma pauperis with the filing of the attached Brief in Opposition to the State's Petition for Writ of Certiorari. The grounds for this application are that respondent Caswell is indigent, and has been incarcerated in the California Department of Corrections since 1978. He applied for and obtained permission to proceed in forma pauperis in his federal habeas corpus proceedings in the district court level and in the Ninth Circuit Court of Appeal. Respondent is currently incarcerated at the California Institution for Men at Chino, California and has less than $100 on his prison account books for various sundries.

Wherefore, for the foregoing reasons, respondent

Caswell respectfully requests that he be permitted to proceed in this matter in forma pauperis.

DATED: November 21, 1996

Respectfully submitted,

Eric S. Multhaup
Attorney for Respondent
Steven H. Caswell

jp-11/21/96-46

DECLARATION OF ERIC S. MULTHAUP

I am the attorney representing respondent Steven Caswell in this matter, pro bono. I have been representing Mr. Caswell for many years, all of which time he has been incarcerated at various facilities within the California Department of Corrections. He applied for and obtained permission to proceed in forma pauperis with his federal habeas corpus petition in the United States District Court for the Eastern District of California, and then was permitted to proceed in forma pauperis in his appeal to the Ninth Circuit Court of Appeal. I believe that he maintains a prison trust account which contains less than $100, which he uses for sundry toiletry items and the like.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed on November 21, 1996 at Mill Valley, California.

Eric S. Multhaup

No. [redacted]

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARTHUR CALDERON, Petitioner

v.

STEVEN H. CASWELL, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ERIC S. MULTHAUP
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235 Pine Street, Suite 1300
San Francisco, CA 94104
(415) 821-6000

Attorney for Respondent

No. 96-629

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARTHUR CALDERON, Petitioner

v.

STEVEN H. CASWELL, Respondent

Respondent Caswell respectfully urges this Court to deny the State's petition for writ of certiorari. The sole issue presented relates to the standard of review applicable to a 28 U.S.C. section 2254 due process claim arising from the state court's failure to instruct on an element requisite to criminal liability in violation of In re Winship, 397 U.S. 358 (1970). This Court recently granted certiorari in California

v. Roy, No. 95-2025, and remanded to the Ninth Circuit en banc panel to address that issue in light of Brecht v. Abramson, 507 U.S. 619 (1993) and O'Neal v. McAninch, 513 U.S. ____, 130 L.Ed.2d 947 (1995). The constitutional issue of the appropriate standard of review will be resolved for the Ninth Circuit in that case. This case involves an unpublished panel decision which reached the correct result under any applicable standard of reversal. The analytical differences between this case and Roy demonstrate that this case does not present the same issue as in Roy, notwithstanding petitioner's assertion, and that no useful purpose would be served by this Court granting certiorari or remanding for reconsideration.

One premise of this Court's per curiam opinion in Roy was that "[n]o one claims that the error here is of the 'structural sort' that def[ies] analysis by 'harmless error' standards." In contrast, the bottom line in this case is that the instructional omission did cause a structural error, because it compelled petitioner to refrain from exercising his right to testify and thus adversely altered the composition of the trial record to his detriment. Rose v. Clark, 478 U.S. 570, 579, n. 7 (1986). Petitioner's testimony, encapsulated and undisputed, in the record below at ER 30-31 to the petition and excerpted in the margin,[1] would have constituted

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[1] "I had only known Englund for about two weeks prior to the commission of these crimes. During this time I had been consuming large quantities of alcohol, PCP and methamphetamine daily.

"On the evening in question, I approached the victims' car with Englund only to ask them for a ride, as Englund had shot himself and needed medical attention. Although I knew Englund had a gun, I did not know he intended to use it

a complete defense to a properly instructed jury, but would have been a complete confession to the improperly instructed jury below. Petitioner's testimony admits the two elements of aiding and abetting liability on which the jury was instructed – knowledge and assistance – and contests only the third element which was omitted, i.e., intent to facilitate co-defendant Englund's felonious plan. Thus, respondent Caswell, at the time of trial facing the aiding and abetting instruction which included only the two elements which he conceded, had no choice but to forego exercising his constitutional right to testify, so that the record available for review as to harmless error is inherently truncated to his detriment. It would be an unconscionable subversion of McAninch to permit a harmless error finding where the effect of the error itself was to forestall presentation of the very evidence which would have most clearly demonstrated prejudice.

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until he pulled it out and pointed it into the victims' car. Surprised by this action, and knowing that Englund was injured, intoxicated and emotionally unstable, I feared that he might use the gun against me as well as against the four people in the car.

"Because I was intoxicated, and not thinking very clearly, I decided that the safest way to handle the situation would be to 'go along' with Englund, rather than to engage him n a direct confrontation. I therefore decided not to challenge him, but instead determined to help him as little as possible while attempting to look out for the ultimate safety of the victims." ER 31-32.

* * *

"When Englund did voice his intention to shoot the victims, I actively discouraged him. I pushed one of the victims over the cliff and out of Englund's firing range seconds before he began shooting. I could not get the other three over the cliff as they were tied together. I never intended to hurt the victims; I tried to push them over the cliff to get them out of Englund's way. I never suggested, directly or indirectly, that Englund shoot them or hurt them in any way." ER 31-32.

The State refuses to recognize the conflict of evidence in the trial record itself as to respondent's mental state, and entirely ignores the unrebutted evidence of what petitioner would have testified. The Ninth Circuit correctly noted that "petitioner did not testify, and there is some conflicting evidence in the record as to his intent," Petitioner's Ex. A, p. 3, but respondent Caswell claims that "it is not apparent," Petition, p. 14. However, an objective review of the record demonstrates that co-defendant Englund was the prime mover and assailant, while respondent Caswell's attitude and conduct was clearly subordinate, on the penumbra of vicarious liability.[2] The instructional error caused such a disincentive to respondent's testimony that the constitutional error must be deemed a structural error which requires reversal under any standard.

Respondent Caswell has been laboring for years in the habeas corpus arena to obtain a fair trial, and it is now within his reach. It would serve no purpose other than to delay justice in this case for this Court to remand and consign respondent to further judicial purgatory while the Ninth Circuit wrestles with Roy. The Ninth Circuit reached the correct result in this case under any standard, regardless of the ultimate disposition of Roy.

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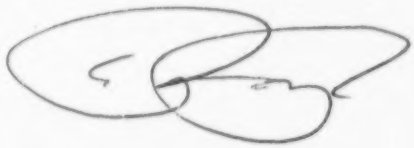
[2] Respondent Caswell chronicled the trial evidence with its conflicts and ambiguities regarding his intent in great detail in "Appellant's Supplemental Brief" filed May 28, 1996 in the Ninth Circuit, all of which is ignored by the State.

Wherefore, for the foregoing reasons, petitioner respectfully requests that this Court deny the State's petition for writ of certiorari.

DATED: November 21, 1996

Respectfully submitted,



Eric S. Multhaup
Attorney for Respondent
Steven H. Caswell

jp-11/21/96-46

DECLARATION OF SERVICE

Re: Calderon v. Caswell, No. 96-629

I, Eric S. Multhaup, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at 235 Pine Street, Suite 1300, San Francisco, California 94104.

I served the attached

ON PETITION FOR WRIT OF CERTIORARI TO
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

on the following individuals/entities by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepaid, in the United States mail at Mill Valley, California, addressed as follows:

Attorney General
1300 I Street, Suite 1101
P.O. Box 944255
Sacramento, California 94244-2550

I declare under penalty of perjury that service was effected on November 21, 1996 at Mill Valley, California and that this declaration was executed on November 21, 1996 at Mill Valley, California.

ERIC S. MULTHAUP
(Typed Name)

(Signature)